FILED
SEP 21 1992
OFFICE OF THE CLERK

NO. 91-719

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN, PETITIONER

versus

RICKEY HAROLD RALEY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

CHRIS GORMAN
ATTORNEY GENERAL

BY: IAN G. SONEGO*
ASSISTANT ATTORNEY GENERAL

DAVID A. SEXTON
ASSISTANT ATTORNEY GENERAL

Criminal Appellate Division
Capitol Building
Frankfort, Kentucky 40601
502-564-7600

Counsel for Petitioner

*Attorney of Record for Petitioner

TABLE OF AUTHORITIES

CASES:

Boykin v. Alabama,
395 U.S. 238 (1969)..... 5

Coleman v. Thompson,
111 S.Ct. 2546 at 2567 (1991)..... 3

*Oliver v. United States,
961 F.2d 1339 (7th Cir. 1992)..... 2

United States v. Gallman,
907 F.2d 639 at 642-644
(7th Cir. 1990), cert. denied,
111 S.Ct. 1110..... 1

United States v. Henry,
933 F.2d 553 at 559 (7th Cir. 1991),
cert. denied, 112 S.Ct. 1703..... 2

*United States v. McGlocklin,
962 F.2d 551 F.2d 551 (6th Cir. 1992)..... 3,5

*United States v. Paleo,
967 F.2d 7 at 11-13 (1st Cir. 1992)..... 1

United States v. Wilkinson,
926 F.2d 22 at 28 (1st Cir. 1991),
cert. denied, 111 S.Ct. 2813..... 2

* New opinion discussed in this brief.

STATUTES AND RULES:

Rule 25.5..... 1

Title 28 U.S.C. §2255..... 2

Violent Career Criminal Act,
Title 18 U.S.C. §922(g)(i)..... 1

Pursuant to Rule 25.5 of this court, the Attorney General of the Commonwealth of Kentucky, as counsel for petitioner, Al C. Parke, Warden of the Kentucky State Reformatory, hereby supplements his previously filed briefs for petitioner. The purpose of this brief is to discuss opinions in three cases that were issued after petitioner's brief was filed and were not published by West Publishing Company in time to be received by counsel to be cited in the petitioner's reply brief.

In United States v. Paleo, 967 F.2d 7 at 11-13 (1st Cir. 1992), the First Circuit held that Paleo was entitled to present a "collateral attack" upon prior felony convictions offered by the government to enhance his sentence under the Violent Career Criminal Act, Title 18 U.S.C. §922(g)(i). The First Circuit also held that the defendant must bear the burden of demonstrating the invalidity of the prior convictions, citing inter alia, United States v. Gallman, 907 F.2d 639 at 642-644 (7th Cir.

1990), cert. denied, 111 S.Ct. 1110; United States v. Henry, 933 F.2d 553 at 559 (7th Cir. 1991), cert. denied, 112 S.Ct. 1703; and United States v. Wilkinson, 926 F.2d 22 at 28 (1st Cir. 1991), cert. denied, 111 S.Ct. 2813. (See Brief for Petitioner, pp. 23-24.) The First Circuit noted that the defendant, "after all, is in the best position to know the procedural facts surrounding the prior conviction and to overcome any skepticism arising out of the lateness of the challenge."

In Oliver v. United States, 961 F.2d 1339 (7th Cir. 1992), Oliver collaterally attacked his guilty plea conviction pursuant to Title 28 U.S.C. §2255. He claimed that his guilty plea (entered 17 years earlier) was not knowing, intelligent, and voluntary, even though the plea was entered on advice of counsel. Oliver claimed that he had not been advised of his right to confront his accusers and his privilege against self-incrimination. Any record of the plea proceedings had been lost or destroyed

because of the lapse of time. The district court denied the petition on two grounds. First, the claim was defaulted for failure to raise it on direct appeal since no cause or prejudice was demonstrated. Second, the delay in filing was unreasonable and prejudicial to the government, and hence the claim was barred under the laches doctrine. The Seventh Circuit affirmed on both grounds, citing inter alia, Coleman v. Thompson, 111 S.Ct. 2546 at 2567 (1991). (See Brief for Petitioner, pp. 10-11.)

In United States v. McGlocklin, 962 F.2d 551 (6th Cir. 1992), the Sixth Circuit upheld the validity of a guilty plea and a nolo contendere plea offered for enhancement of McGlocklin's sentence under the United States Sentencing Guidelines and reversed the district court. Both convictions occurred in the Tennessee State Courts. The facts of the nolo plea are somewhat similar to this case. The Sixth Circuit stated regarding that plea, 962 F.2d at 554:

> We find that defendant's Cheatham County nolo contendere plea was valid under constitutional standards. The judge asked defendant if his lawyer had explained to him the charge against him and if he understood the charge . . . . Defendant responded the charge had been explained and that he understood it. The judge also asked the defendant if his lawyer had told him the range of punishment for the crime. Defendant responded that his lawyer had done so. We find that these exchanges on the record, are sufficient to find that defendant was aware of the nature of the charge against him and the penalties he faced. Nowhere in the record before this Court does defendant state that he was actually unaware of any of this information or that his plea was not voluntary. [Emphasis added.]

Regarding the 1981 guilty plea in this case, the plea bargain form signed by Raley showed the offenses he pleaded to and the penalty range for third degree burglary and the five year sentence recommended (and subsequently imposed by the Court). (J.A. 17-18.) Raley admitted that he signed the form, that he told the judge he was not forced to plead guilty, and that he was told he had a right to a jury trial. (J.A. 50-51,

65; TE 19-21, 40-41. See Brief for Petitioner, pp. 36-38; Brief for United States, pp. 3-4.)

The Sixth Circuit's opinion in United States v. McGlocklin, supra, clearly reflects that the Sixth Circuit has not ruled that the lack of the colloquy described in Boykin v. Alabama, 395 U.S. 238 (1969), itself provides a ground to automatically invalidate a prior conviction offered for sentencing enhancement. Hence the Commonwealth's argument to that effect should be considered by this Court. (See Reply Brief for Petitioner, pp. 1-5; Brief for Petitioner, pp. 14-18.)

CHRIS GORMAN
ATTORNEY GENERAL

BY: IAN G. SONEGO*
ASSISTANT ATTORNEY GENERAL

DAVID A. SEXTON
ASSISTANT ATTORNEY GENERAL

Criminal Appellate Division
Capitol Building
Frankfort, Kentucky 40601
502-564-7600

Counsel for Petitioner

*Attorney of Record for Petitioner